

CLARIFYING LANGUAGE FOR ENFORCEMENT OF WATER POLLUTION AND WASTE DISPOSAL IN NEW HAMPSHIRE STATUTE

SUMMARY

RSA 485-A:12 directs the Department of Environmental Services (DES) to enforce water quality standards (WQS), but the statutory language only deals with discharges that cause violations of water quality standards. However, RSA 485-A:22 gives DES enforcement authority and specifies penalties for any WQS violation, not limited to discharges. WQS include RSA 485-A:8-11 and the Surface Water Quality Regulations (Env-Wq 1700). Early in Clean Water Act implementation (~1970's), discharges were practically the only activities that were considered to cause surface water problems. It is now established that other activities, not involving discharges, can also result in violations of water quality standards. The best example is water withdrawals or diversions, which involve no discharge but may result in damage to aquatic life or recreation opportunity. Likewise, extensive removal of canopy cover on small order streams that support cold water fish can result in summer water temperature increases that result in extirpation of these species (e.g., trout). DES has proposed revisions to RSA 485-A:12 to clarify that DES has the authority to take enforcement actions to abate violations of water quality standards whether or not they are caused by a discharge, and to make the language of RSA 485-A:12 consistent with the scope of penalties specified in RSA 485-A:22.

APPLICABLE LAWS AND REGULATIONS

There are no applicable federal laws or regulations.

New Hampshire statute RSA 485-A:12, I and II currently states:

485-A:12 Enforcement of Classification. –

I. After adoption of a given classification for a stream, lake, pond, tidal water, or section of such water, the department shall enforce such classification by appropriate action in the courts of the state, and it shall be unlawful for any person or persons to dispose of any sewage, industrial, or other wastes, either alone or in conjunction with any other person or persons, in such a manner as will lower the quality of the waters of the stream, lake, pond, tidal water, or section of such water below the minimum requirements of the adopted classification. If the department shall set a time limit for abatement of pollution under paragraph II, and it becomes apparent at any time during the compliance period that full compliance with the adopted classification will not be attained by the end of such period due to the failure of any person to take action reasonably calculated to secure abatement of the pollution within the time specified, the

department shall notify such person or persons in writing. If such person or persons shall fail or neglect to take appropriate steps to comply with the classification requirements within a period of 30 days after such notice, the department shall seek appropriate action in the courts of the state.

II. If, after adoption of a classification of any stream, lake, pond, or tidal water, or section of such water, including those classified by RSA 485-A:11, it is found that there is a source or sources of pollution which lower the quality of the waters in question below the minimum requirements of the classification so established, the person or persons responsible for the discharging of such pollution shall be required to abate such pollution within a time to be fixed by the department. If such pollution is of municipal or industrial origin, the time limit set by the department for such abatement shall be not less than 2 years nor more than 5 years. For good cause shown, the department may from time to time extend any time limit established under this paragraph. Any determination by the department under this paragraph shall be subject to appeal as provided for in RSA 485-A:19.

New Hampshire statute RSA 485-A:22 currently states, in part:

I. Any person who willfully or negligently violates any provision of this subdivision [note: the subdivision, titled "Enforcement", begins at RSA 485-A:12 and ends at RSA 485-A:22-a] or RSA 485-A:4-6; or any rule of the department adopted pursuant to this subdivision or RSA 485-A:4-6 or any condition or limitation in a permit issued under this subdivision or RSA 485-A:4-6; or who knowingly makes any material false statement, representation, or certification in any application, record, report, plan, or other document required to be filed or maintained pursuant to this subdivision or RSA 485-A:4-6 or pursuant to a rule adopted by the department under this subdivision or RSA 485-A:4-6 or who knowingly makes any such statement, representation, or certification in connection with any permit issued under this subdivision or RSA 485-A:4-6; or who knowingly renders inaccurate, falsifies, or tampers with any monitoring device or method required under this subdivision or RSA 485-A:4-6 or rule of the department adopted under this subdivision or RSA 485-A:4-6 or required in connection with any permit issued under this subdivision or RSA 485-A:4-6; or who knowingly fails, neglects, or refuses to obey any lawful order of the department, shall, notwithstanding the provisions of RSA title LXII, be punished by a fine of not more than \$25,000 for each day of such violation or imprisoned for not more than 6 months or both.

II. Any person who shall violate any provisions of this subdivision or RSA 485-A:4-6, or any lawful regulation of the department issued pursuant to this subdivision or RSA 485-A:4-6, or any condition or limitation in a permit issued under this subdivision or RSA 485-A:4-6, or who shall fail, neglect, or refuse to obey any order lawfully issued pursuant to this subdivision or RSA 485-A:4-6, shall be subject to a civil penalty not to exceed \$10,000 per day of such violation.

III. The department shall issue a written cease and desist order against any discharge or act in violation of this subdivision or RSA 485-A:4-6 or lawful regulation of the department made under them or any condition of any permit

lawfully issued by the department, and any such discharge or act may be enjoined by the superior court upon application of the attorney general, whether the court is in term time or vacation. Municipalities shall comply with such orders pursuant to RSA 38:25.

New Hampshire surface water quality regulations, Env-Wq 1700, state:

Env-Wq 1701.02 Applicability

(a) These rules shall apply to all surface waters.

(b) These rules shall apply to any person who causes point or nonpoint source discharge(s) of pollutants to surface waters, or who undertakes hydrologic modifications, such as dam construction or water withdrawals, or who undertakes any other activity that affects the beneficial uses or the level of water quality of surface waters.

DISCUSSION

In RSA 485-A:12, I, DES is charged with enforcing the classification of surface water quality (see first sentence, “enforce such classification”), which means taking enforcement actions to ensure that all designated uses are supported and the WQS as specified in statute or rule are met. RSA 485-A:12, I specifically mentions that discharges of wastes resulting in WQS violations are unlawful (see first sentence, “dispose of any sewage, industrial, or other wastes”) but does not mention activities other than discharges that result in WQS violations. This section of the statute would indicate that DES has the authority to require abatement of any discharge of wastes that cause a surface water to not support the designated uses appropriate for its classification.

RSA 485-A:12, II states that, if the minimum requirements for classification of a surface water body are not met, “the person or persons responsible for the discharging of such pollution shall be required to abate such pollution within a time to be fixed by the department”. This language does not limit enforcement to disposal of sewage or wastes, but does limit enforcement to “discharges” of pollution.

The term “discharge” is not defined in RSA 485-A:2 or in the Clean Water Act. The U.S. Supreme Court considers discharge to mean “flowing or issuing out”¹ but a discharge does not need to contain a pollutant². By this definition, non-point sources of pollution could be considered a discharge, but changes in water level due to water withdrawals would not be, nor would changes in water temperature due to loss of riparian canopy.

RSA 485-A:22 assigns penalties for violations of WQS (“any provision of this subdivision or RSA 485-A:4-6; or any rule the department adopted pursuant to this subdivision or RSA 485-A:4-6 or any condition or limitation in a permit issued under this subdivision or RSA 485-A:4-6”) whether or not a discharge is involved. The Surface

¹ *D. Warren Co. v. Maine Board of Environmental Protection et al*, 547 U.S. 370, 126 S.Ct. 1843 (2006)

² *Alabama Rivers Alliance v. Federal Energy Regulatory Commission*, 325 F.3d 290, 295-6 (DC Cir 2003)

Water Quality Regulations, Env-Wq 1700, were adopted under the statutory authority of RSA 485-A:6; and, therefore, constitute a rule and lawful regulation as referenced in RSA 485-A:22, I, II, III, and V. In Env-Wq 1701.02, the regulations are defined to apply to both point and non-point sources, as well as to hydrologic modifications and “any other activity that affects the beneficial uses or the level of water quality of surface waters”. Therefore, RSA 485-A:22 provides DES with clear authority to enforce all violations of the Surface Water Quality Regulations. Any activity that causes or contributes to a violation of the regulations would be unlawful and subject to penalties.

House Bill 1348, requested by DES in the 2010 legislative session, proposed to revise the language in RSA 485-A:12, I and II to clarify the language and make it consistent with the penalties provisions of RSA 485-A:22. While DES has broad enforcement authority from RSA 485-A:22, this is not apparent from the language in RSA 485-A:12. HB 1348 proposed to change RSA 485-A:12, I and II to read as follows:

Explanation: Matter added to current law appears in ***bold italics***.
 Matter removed from current law appears ~~[in brackets and struck through.]~~
 Matter which is either (a) all new or (b) repealed and reenacted appears in regular type.

I. After adoption of a given classification for a ~~[stream, lake, pond, tidal water, or section of such]~~ ***surface*** water, ~~[the department shall enforce such classification by appropriate action in the courts of the state, and]~~ it shall be unlawful for any person or persons to ~~[dispose of]~~:

(a) Discharge any sewage, industrial, or other wastes, either alone or in conjunction with any other person or persons, in such a manner as will lower the quality of the ~~[waters of the stream, lake, pond, tidal water, or section of such]~~ ***surface*** water below the minimum requirements of the adopted classification~~[-];~~
or

(b) Cause, allow, or contribute to any other activity that lowers the quality of the surface water below the minimum requirements of the adopted classification, including but not limited to diversion of water, removing trees or other riparian vegetation so as to alter water temperature, or increase the potential for stormwater run-off.

I-a. If the department shall set a time limit ***under paragraph II*** for abatement of pollution ~~[under]~~ ***or for cessation or modification of an activity that is prohibited by paragraph [H] I***, and it becomes apparent at any time during the compliance period that full compliance with the adopted classification will not be attained by the end of such period due to the failure of any person to take action reasonably calculated to ~~[secure abatement of]~~ ***abate*** the pollution ***or to cease or modify the activity*** within the time specified, the department shall notify such person or persons in writing. If such person or persons shall fail or neglect to take appropriate steps to comply with the classification requirements within a period of

30 days after such notice, the department shall seek appropriate action in the courts of the state.

II. If, after adoption of a classification of any [~~stream, lake, pond, or tidal water, or section of such~~] **surface** water, including those classified by RSA 485-A:11, [~~it is found~~] **the department finds** that there is a source or sources of pollution, **or any other activity is occurring**, which [~~lower~~] **lowers** the quality of the waters in question below the minimum requirements of the classification so established, the person or persons responsible for the [~~discharging~~] **discharge** of such pollution **or for causing, allowing, or contributing to the activity** shall be required to abate such pollution **or cease or modify the activity** within a time to be fixed by the department. If such pollution is of municipal [~~or industrial~~] origin, the time limit set by the department for such abatement shall be not less than 2 years nor more than 5 years **unless the discharge can reasonably be abated in less than 2 years**. For good cause shown, the department may from time to time extend any time limit established under this paragraph. Any determination by the department under this paragraph shall be subject to appeal as provided for in RSA 485-A:19.

The tasks of Water Quality Standards Advisory Committee Enforcement Working Group are:

- (1) To review RSA 485-A:12, RSA 485-A:22, and Surface Water Quality Regulations;
- (2) Ascertain if there is, in fact, a need to modify the language in RSA 485-A:12; and
- (3) Make recommendation for any appropriate statutory language changes.

The proposed changes to RSA 485-A:12 from HB 1348, quoted above, will be the starting point for discussions.